No. 11,797

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

STATE OF CALIFORNIA,
Appellant,

vs.

UNITED STATES OF AMERICA,
Respondent.

Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

APPELLANT'S OPENING BRIEF.

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SUBJECT OF APPEAL.

This is an appeal from the judgment of the District Court awarding the State of California the sum of One and no/100 ($1.00) Dollar in each action for its interest in each of the following parcels: Parcels 3A and 3B in case No. 22147; Parcel 2 in case No. 22261 and Parcel 2 in case No. 22416. These actions were consolidated for trial and have been consolidated for purposes of appeal. The same general state of facts are present in all of the parcels. The parcels, which are the subject of this appeal, are marked in pink on the map of Defendant's Exhibit "C", which exhibit

has been transmitted in the original form as part of the record on appeal. The trial Court found that the State of California was the owner of these areas, so marked in pink, and no appeal is taken from that judgment. The sole question before this Court, and the only point raised on this appeal, is the question of the proper value of the areas.

SPECIFICATIONS OF ERROR.

Appellant cites the following as its specifications of error:

1. That the trial Court erred in finding that the interest or title that the State of California retained in Parcels 3-A and 3-B of action No. 22147, Parcel 2 of action No. 22261 and Parcel 2 of action No. 22416 was retained solely for the purpose of providing ingress and egress to said lots sold.

2. That the Court erred in finding that the interest or title that the State of California retained in the above-mentioned parcels was, at the date of the taking herein, subject to easements for access to and from the lots delineated upon the survey map.

3. That the Court erred in finding that the proper compensation for the taking of the aforesaid parcels, including any and all damages to the larger tracts to which the said parcels were a part, was the sum of $1.00.

4. That the Court erred in failing to find that said property was never laid upon the grounds as streets.

5. That the Court erred in not finding and in not concluding that the said property was never opened nor declared open as streets.

6. That the Court erred in not finding and in not concluding that the said property was never dedicated as streets.

7. That the Court erred in not finding and in not concluding that the said property was not subjected to any easement as streets.

8. That the said Court erred in rendering its decision and making and entering its judgment herein in that the evidence was and is insufficient to justify the judgment rendered by said Court.

9. That the Court erred in rendering its decision and making and entering its judgment herein against the defendant, State of California, in that said judgment is contrary to the law and the facts.

10. That the Court erred in not making its judgment herein in favor of the defendant, State of California, and against plaintiff United States of America in the sum of $31,232.25 in action No. 22147, in the sum of $56,384.10 in action No. 22261 and in the sum of $8,250.03 in action No. 22416.

ARGUMENT.

STATEMENT OF FACTS.

The State of California and the United States of America entered into a stipulation. (Clk. T. 34-39; 165-169.) Briefly summarized, the stipulation pro-

vides that prior to September 9, 1850, all of the lands which form the basis of the subject matter of this appeal were tide and submerged lands covered by the waters of the Bay of San Francisco. California, upon its admission to the Union on that date, acquired the title to these tide and submerged lands as sovereign lands. By the Act of 1868, page 716, a Board of Tide Land Commissioners was created and authorized and directed to take possession of the salt marsh and tide lands and lands lying under water in the City and County of San Francisco to have the same surveyed to a point within twenty-four feet of water at the lowest stage of the tide, and the Board was then directed to establish the water line front of San Francisco and to cause all of the property belonging to the State lying south of Second Street to be surveyed into lots and blocks.

Pursuant to said Act, and by its authorization and direction, the Board prepared maps of the area as resurveyed and sold the lots, so established, at public auction. All of the conveyances of lots were by metes and bounds, the State retaining title to the areas marked in pink as above stated.

Of these areas, Parcel 3A of action No. 22147 consists of 6.85 acres, Parcel 3B of action No. 22147 consists of 28.13 acres, Parcel 2 of action No. 22261 consists of 64.61 acres, and Parcel 2 of action No. 22416 consists of 8.73 acres.

It will be noted from an examination of defendant's Exhibit "C" that the area marked in pink consists of a series of strips of land lying between the

parcels conveyed. It was the contention of the United States, and the finding of the trial Court that the strips were streets and were retained by the State of California solely for ingress and egress. The State of California disagrees with this contention and finding and it is the claim of the State of California that the land retained by the State was acreage and was entitled to be valued upon the same basis as the remainder of the acreage in the condemnation action.

The trial Court expressly found, and appellant wishes to again emphasize the fact, that at the time of the taking in this condemnation all of the acreage lay under the waters of the Bay of San Francisco. This was true of the adjacent property condemned and was also true of these areas marked in pink on defendant's Exhibit "C", which parcels are the subject of this appeal. (Clk. T. 43, 103, 149.)

I.

THE STATE IS ENTITLED TO ADEQUATE COMPENSATION FOR ITS FEE SIMPLE TITLE TO THE PARCELS HERE INVOLVED.

A. The holding in this case is in direct conflict with United States v. Benedict, 280 Fed. 76. (Affirmed U. S. v. Benedict, 261 U. S. 294.)

It is the contention of the State of California that it is entitled to adequate compensation for its fee simple title to the parcels which are the subject of this appeal. The finding of the trial Court is in direct conflict with the authority established by *United States v. Benedict,* 280 Fed. 76. (Affirmed *U. S. v.*

Benedict, 261 U. S. 294.) In that case one Langley had conveyed a considerable body of land, consisting both of upland and land under water, into trust with a power of sale. In compliance with this power the trustee of the Langley estate conveyed certain portions of the property to the City of New York to be used as streets. Parenthetically, it should be noted here that the case at bar is a stronger case than the *Benedict* case, since in the latter case the city could not have used the property for any other purpose, whereas, in the case at bar the State did actually retain the fee title interest to the property. However, as in the case at bar, the so-called streets in the *Benedict* case were never opened or used as highways. Thereafter the United States acquired title to the Langley realty. An award was made to the Langley estate at a rate of $2.00 per square foot. The Court holds that the city is entitled to a proration of the award based on the number of square feet held by the city at the rate of $2.00 per square foot, and in this connection the Court states:

> "It is now argued that, with a title of this kind and on evidence proving that 'whether or not the city held title to' the 81,120 square feet, the value of the entire property was just the same, and the award to the Langley Estate should not be disturbed in amount. But, if the record be examined to ascertain why the expert witnesses substantially agreed that the value of the land was unchanged by the conveyance for street purposes, it is found that they all said in effect that street value (i. e., land value of the streets) was

'reflected' in the value of the land as bounded or limited by the proposed streets.

"This means that, if and when the streets were opened, the abutting property would, by reason of the streets, be worth at least as much more as was the value of the land appropriated for highway purposes. But no streets have been opened in the physical sense, and the city owns the surface to be devoted to streets. That it is held in trust for a public purpose does not in any way change its market value, and the city has been as much deprived of what it owned as was the Langley Estate. To put it another way, the Langley Estate has been awarded all that the land is worth, streets and all, *because, when streets are opened, the land they have left will be worth the amount of the award. This will not do. The Government is called upon to make just compensation for things as they are, not as they may be hereafter, and the compensation must flow to those who were actually deprived of what they own.*" (Italics ours.)

In the instant case, the United States called two expert witnesses, both of whom made exactly the same error in the valuation as that made in the *Benedict* case.

Mr. Phillips, the first witness for the United States, testified that the value of the property of the State was $1.00. It is perfectly evident from a reading of the record that he based this valuation on the assumption that the property was streets and furthermore he specifically testified that the value of the street area was reflected in the adjoining property. This

is the identical procedure which was adjudged an error in the *Benedict* case. On direct examination Mr. Phillips testified:

> "A. Originally land is purchased in large acreages, and when there is demand on the part of the public for the purchase of that land, it is naturally subdivided. The subdivider lays out those tracts into what he believes is the best size lot and block for the particular need at that time. He files a map showing streets, so that access can be obtained to all of these blocks which he disposes of, and as a result of that, the value that was in the area taken by the streets is absorbed by the land that is sold plus an additional value to that land. If there was not an additonal value there would be no object in the man subdividing it, because he could just as well sell it off in acreage, so the appraiser must take the position, and it is borne out by the facts, *that the value of the street is absorbed into the value of the property sold plus an additional value.*" (R. T. p. 85, line 22, p. 86, line 11; italics ours.)

Mr. Phillips then went on to explain that in reality his testimony was based on the fact that the areas of the State's claim were streets and he stated:

> "* * * It doesn't make any difference to the appraiser whether the lots are sold by metes and bounds or by lot and block number. The average appraiser believes if it is sold by lot and block there is no question but what the title comes to the center of the street, and if it is sold by metes and bounds it only goes to those metes and bounds. But a description of the metes and bounds describes that lot as fronting on

some particular street, and with the filed maps carrying that out, we must suppose that those streets are designated as public streets and that they cannot be taken away from that owner without suffering him a great deal of damage, and for that reason you cannot put any value on a street, no more than the nominal sum of a dollar." (R. T. p. 87, line 16 to p. 88, line 3.)

On cross-examination Mr. Phillips testified as follows:

"Q. (Mr. Haas). And you have based the testimony, have you not, upon the theory that these parcels are streets, have you not?

A. (Mr. Phillips). Yes, sir, that they are streets—

Q. That is all. You have answered.

A. —that they are streets furnishing access to the property sold by the Tide Land Commissioners." (R. T. p. 90, lines 18-23.)

Mr. Thomas, the other expert witness for the United States, made exactly the same error as that made by Mr. Phillips. After testifying that the property of the State was worth $1.00, on direct examination Mr. Thomas testified:

"Q. (Mr. Healy). Now, you have given your conclusions to his Honor. Will you kindly state some of the reasons that go into the conclusions you have just expressed?

A. (Mr. Thomas). I appraise the property as a subdivided property. I have made a complete analysis of the many sales that have been made of the properties abutting the properties in question, the subject property, and have consequently re-

flected the value of the property, the value of the roadways, streets, strips, or whatever you choose to call them is reflected in the abutting property, and the organization that I am associated with, we have put on many subdivisions and bought property in acreage and sold it and subdivided it, and, consequently, the subdividing, with access for ingress and egress, the value has been reflected in the properties we have sold the same as the subject property here. *If that property was appraised* before it was subdivided, appraised regardless of the map that had been filed, *as just acreage, it would have an entirely different value,* but the property was appraised as being owned by several property owners.

Q. You mean the blocks now?

A. The blocks. Consequently they paid for the streets that were supposed to exist as shown on that map, *and the benefit of those streets was reflected in the properties that were acquired.* If that was not laid out as a street, it was not a subdivision, if it was appraised as an entire, just acreage, it would have an entirely different value. We figured that the value would be about one-fifth of what it was as a subdivided property, so that if the title was vested in one ownership as a whole, it would be appraised for a whole lot less than it was appraised as a subdivided property by me." (R. T. p. 98, line 11 to p. 99, line 14; italics ours.)

On cross-examination Mr. Thomas testified:

"A. (Mr. Thomas). I appraised it as I understood it to be, as subdivided property with all the different ownerships. Now, as that condition

existed in my mind, upon investigation, those were streets, strips, roadways, or whatever you might choose to call them.

Q. (Mr. Haas). In other words, your appraisal is based on the theory that those were actually streets?

A. Absolutely, yes.

Q. And if they were not streets, that appraisal would not be affected, then?

A. If they were not, if it was all acreage, and it was in one ownership, my value would be one-fifth of what it was as it is laid out on the map." (R. T. p. 102, lines 7-17.)

In addition, both Mr. Phillips and Mr. Thomas testified that the value of the State's claim would be nominal on the basis that since the property was either sixty-four feet wide or eighty feet wide, and was of far greater length, the property could not have practical use. (R. T. pp. 94, 103, lines 22-25, p. 104, lines 1-5.) However, it is obvious that such a contention is not a conclusion of fact nor a proper expression of expert opinion, but is in reality a conclusion of law. The files of these cases demonstrate that numerous awards have been made by the government for property of the following sizes and for the amounts as indicated:

Action No. 22261. Parcel No. 29. 25 feet x 100 feet and Parcel No. 31. 95 feet x 100 feet x 54 feet x 105 feet, 11½ inches. (A portion of Lots 5 and 6 of Tide Land Commissioners' Block 319.) Amount of award $195.00; Final Judgment filed February 23, 1944.

Parcel No. 30. 25 feet x 100 feet. Amount of award $50.00; Final Judgment filed April 26, 1945. (Parcel 30 is adjacent to Parcel 29 above.)

Parcel No. 28. 100 feet x 45 x 105 feet, 11½ inches x 74 feet, 8½ inches. (Being a portion of Lots 2 and 3 of Tide Land Commissioners' Block 319) and Parcel No. 32, being a triangle 54 feet x 165 feet, ¾ inches x 156 feet, 3 inches. (Being part of Lots 7, 8, 9 and 10 of Tide Land Commissioners' Block 319.) Amount of award $197.00; Final Judgment filed September 25, 1944.

Parcel No. 58. 100 feet x 300 feet. (Being all of Lots 3 through 8 of Tide Land Commissioners' Block 395) and Parcel No. 71. 100 feet x 150 feet. (Being Lots 12, 13 and 14 of Tide Land Commissioners' Block 763) and Parcel No. 73. 100 feet x 150 feet. (Being Lots 18, 19 and 20 of Tide Land Commissioners' Block 763.) Amount of award $235.00; Preliminary Judgment filed October 6, 1943.

Parcel No. 44. 50 feet x. 100 feet. (Being Lot 4 of Tide Land Commissioners' Block 725.) Amount of award $68.00; Final Judgment was filed February 21, 1944.

Parcel No. 10. 100 feet x 200 feet. (Being Lots 1, 2, 23 and 24 of Tide Land Commissioners' Block 714.) Amount of award $300.00; Preliminary Judgment filed October 6, 1943.

Parcel No. 13. 100 feet x 200 feet. (Being Lots 15, 16, 17 and 18 of Tide Land Commissioners' Block 714) and Parcel No. 11. 100 feet x 300 feet. (Being

Lots 3 through 8 of Tide Land Commissioners' Block 714.) Amount of award $900.00; Final Judgment filed February 29, 1944.

Action No. 22147. Parcel No. 263. 50 feet x 200 feet x 7 feet, 7¼ inches x 62 feet, 7 inches x 104 feet, 2½ inches. (Being Lots 12 and fractional Lot 17 of Tide Land Commissioners' Block 1036.) Amount of award $130.00; Final Judgment filed August 14, 1944.

Parcel No. 265. 50 feet x 100 feet. (Being Lot 22 of Tide Land Commissioners' Block 1036.) Amount of award $75.00; Final Judgment filed August 14, 1944.

Parcel No. 256. 200 feet x 196 feet, 8 inches x 273 feet, 3 inches x 382 feet, 10½ inches. (Being all of Tide Land Commissioners' fractional Block 1031.) Amount of award $1,000.00; Final Judgment filed August 3, 1944.

Parcel No. 249a. In two parts being 100 feet x 150 feet and 100 feet x 50 feet. (Being Lots 1, 2, 3 and 18 of Tide Land Commissioners' Block 1024.) Amount of award $440.00; Final Judgment filed August 3, 1944.

Parcel No. 246. A triangle 267 feet, 7 inches x 283 feet, 5½ inches x 97 feet, 7½ inches. (Being all of Tide Land Commissioners' fractional Block 68.) Amount of award $640.00; Final Judgment filed August 3, 1944.

Parcel No. 266. In two parts 50 feet x 100 feet and 350 feet x 100 feet. (Being Lots 1 and 17 through 23 inclusive of Tide Land Commissioners' Block 1036.)

Amount of award $591.00; Final Judgment filed June 28, 1944.

Parcel No. 255. A triangle 131 feet, 2 inches x 179 feet, 3 inches x 122 feet, 2 inches. (Being all of Tide Land Commissioners' fractional Block 1028.) Amount of award $125.00; Final Judgment filed October 10, 1944.

Since the State's property differs in no way from the property of the other owners in the area of condemnation, and since under the *Benedict* case it is improper to reflect the value of the State's interest in the value of the adjoining property it must, of necessity, follow that the State's interest is worth more than a nominal value. The only evidence of actual value is found in the testimony of Mr. Field wherein he testified that the property was worth 1½% per square foot and the amounts are totaled as follows: Action No. 22416, Parcel 2, $6,548.00; (R. T. 47) Action No. 22147, Parcel 3A, $5,111.00; (R. T. 47) Action No. 22147, Parcel 3B, $20,325.00; Action No. 22261, Parcel 2, $48,458.00 (R. T. p. 48).

Mr. Field, the expert witness called by the State, based his appraisal on the property as a whole and did not reflect the value of the adjoining property in the property claimed by the State nor did he reflect the value of the State's property in the valuation given to the remaining property. (R. T. p. 51, lines 13-15.)

So far as actual value is concerned it is perfectly evident that none of the property had utility as such by reason of the fact that all of the property lay

under the waters of the bay, but while such property did not have utility it admittedly had value, and any conclusion that it did not is obviously a conclusion of law and not a statement of fact.

We respectfully urge that this Court reverse the finding of the trial Court that the State was only entitled to nominal value for the taking and that this Court either make a finding of the actual value or direct the trial Court to make such finding.

B. There is no evidence that the areas here involved ever were streets.

It was the contention of the United States that the areas involved on this appeal were streets, and that consequently the State was entitled only to nominal compensation for its ownership. Actually there is no evidence in the record that these areas were ever dedicated or accepted as streets. Even if we assume, for the sake of this argument, that the dedication of the areas as "streets" on the map of the Tide Land Commissioners was an offer of dedication, there is still no evidence that such offer was ever accepted by any authority nor ever, as a matter of fact, that such dedication was ever made. If the property owners had improved their property it would, of course, have been necessary for them to raise the property above the waters of San Francisco Bay. In the event that this had been done the State would undoubtedly have dedicated the streets but in return the State would have received an extremely valuable waterfront property which would have more than compensated it for

the acreage it had lost. At the time of condemnation the so-called streets were approximately twenty-four feet under water of the Bay and had never been used as a means of ingress or egress. In short, they had never become streets.

The unanimous testimony of the appraisers is that all values are on a basis of potential reclamation, that this reclamation is practicable only of a large area in a single operation.

This being the case it becomes clear that the question whether or not the strips involved would be used or opened as streets is a matter of pure guesswork. It would depend entirely upon the nature and purpose of the reclamation. The history of the city, from the cases, shows that tideland sales of this nature were made in expectation of continuous development, bit by bit, by individual lot owners. (*Eldridge v. Cowell,* 4 Cal. 80, 87.) This happened in the early days, and did not happen in recent years. The filling of the area around Channel Street resulted from accident, the San Francisco Fire of 1906. (*McGinn v. Harbor Commissioners,* 113 Cal. App. 695, 698.) The next move was the 1912 India Basin condemnation. (See Defendant's Exhibit G.) Gradual piecemeal reclamation, preserving the street lines, has not occurred during this century, except by happenstance of the 1906 Fire. Any reclamation of this area, after it had been untouched for fifty years, would be feasible only under a scheme whereby the entire area would be acquired by the reclaiming party. In such an oper-

ation, the theory that the street and lot lines would be followed is without support; on the contrary, the reclaiming party would have to acquire the entire area, including the strips reserved by the State or it would become impracticable to profitably reclaim. This being the case, there was and is no support for valuation on a subdivision basis since there was no more likelihood that the area would be reclaimed as a subdivision than that it would be reclaimed for a railroad yard, shipyard, or large factory area. It cannot be presumed that such an operation would be carried through without first acquiring title to *all* the land involved, including the strips originally reserved for streets, indeed the appraisers in this case in effect so testified.

There was no conflict on this point. Mr. Phillips, the appraiser for the United States, testified that the only way to bring this property into the market would be to reclaim it as a whole. (R. T. 95, lines 15-16.) The testimony of Mr. Field, appraiser for defendant, was to the same effect. (R. T. 56, lines 18-20.)

This being the case, values founded on a subdivision basis, as prescribed by the judgment here appealed from, are speculative. The acreage basis above affords true indicia of value, since only on that basis is reclamation practicable.

It is settled law in the State of California that an offer to dedicate an area as streets must be accepted before the area becomes a street.

County of Inyo v. Given, 183 Cal. 415, 418, 419, 420.

In that case the Supreme Court of California states:

"A dedication without acceptance is, in law, merely an offer to dedicate, and such offer does not impose any burdens nor confer any rights, unless there is an acceptance. The rule therefore is, that acceptance on the part of the public is necessary to a valid dedication of land as a highway. (1 Elliott on Roads and Streets, sec. 122; 8 R. C. L., p. 898.) Respondent claims, however, that defendants are estopped to deny that the streets delineated on the map were accepted, by reason of the filing of the map and the sale of lots with reference thereto, and it was upon this theory, no doubt, that the trial Court based its decision.

"That some confusion exists in the authorities in this state where the subject has received consideration there can be no doubt. Some of the cases confuse the doctrine of dedication with other doctrines pertinent only to private inter-relations growing out of sales. The case of Town of San Leandro v. LeBreton, 72 Cal. 170 [13 Pac. 405], is of such character. It is there held that where an owner of land lays off a town and makes a map thereof showing it to be divided into streets, alleys and lots, and then sells lots with reference to such map, he thereby makes an irrevocable dedication of the space represented on the map as streets, to the use of the public, and that in such a case no formal acceptance is necessary by the town authorities. The rule announced in this case is mere *dictum,* as it appeared that there

was an acceptance. The rule declared in that case is one of constructive dedication, and undoubtedly could be invoked in an action between the dedicator and his grantees. But the purchasers here, if there be any, are not complaining. . . ."

See also:

City of Anaheim v. Langenberger, 134 Cal. 608, 66 Pac. 855;

City of Los Angeles v. Kysor, 125 Cal. 463, 58 Pac. 90;

City of Sacramento v. Clunie, 120 Cal. 29, 52 Pac. 42;

Archer v. Salinas City, 93 Cal. 43, 28 Pac. 839.

In order that there be a dedication and acceptance in this case, it is our contention that it would first have been necessary to raise this land above the waters of the Bay of San Francisco. Had this been done the State would have been more than greatly compensated for a dedication of these parcels as streets, since such reclamation would have resulted in the State possessing valuable *reclaimed* water front property without expense to it. (Defendant's Exhibit "C": Parcels 1 and 2 in case No. 22147; Parcel 1 in case No. 22416, and Parcel 1 in case No. 22261) and valuable usable and taxable property. However, at the date of condemnation, these strips, which the the trial Court has found to be streets, still lay under the waters of the Bay and had never been used by anyone for ingress or egress to the adjoining property.

It is virtually axiomatic that the condemner must compensate for property in the condition that he finds it.

Kerr v. South Park Commissioners, 117 U. S. 379, 386;
Shoemaker v. United States, 147 U. S. 282, 304;
United States v. Benedict, 280 Fed. 76.

At the time of the taking the land involved in this appeal was not, and never had been, a street and lay under the waters of the Bay exactly in the same condition as the property adjoining it.

CONCLUSION.

It is respectfully urged that the judgment of the trial Court awarding nominal damages to the appellant, State of California, on Parcels 3A and 3B in case No. 22147, and Parcel 2 in case No. 22261, and Parcel 2 in case No. 22416 be reversed and that this Court either find the value of this property or direct the trial Court to make such finding.

Dated, San Francisco, California,
March 31, 1948.

Respectfully submitted,

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